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Cruz City 1 Mauritius Holdings v Unitech Ltd and other companies

[2013] EWHC 1323 (Comm)

b

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

FIELD J

10, 23 MAY 2013

c *Practice – Pre-trial or post-judgment relief – Disclosure in aid of enforcement – Arbitral awards made against defendants – Court permitting claimant to enforce awards in same manner as judgments – Defendants not satisfying awards – Claimant applying for order compelling defendants to provide disclosure of worldwide assets – Whether court having jurisdiction to make order and whether just and convenient to do so – Senior Courts Act 1981, s 37(1) – CPR 71.*

d

Practice – Service – Pre-trial or post-judgment relief – Court permitting service of disclosure order on solicitors previously acting for defendants – Arbitration proceedings effectively concluded and claimant not relying on Arbitration Act 1996 – Whether open to court to serve on solicitors – CPR 62.2.

e The claimant and the defendants were involved in a joint venture arrangement for the development of land in Mumbai. Disputes arose between them. At arbitration, three partial or final awards were made against certain of the defendants. One award was the subject of a successful jurisdictional challenge while another such challenge failed. The defendants paid nothing towards f satisfying the remaining two awards. The claimant obtained orders under s 66(1) of the Arbitration Act 1996 permitting it to enforce them in the same manner as judgments or orders of the court. In the present proceedings, the claimant applied under s 37(1)[a] of the Senior Courts Act 1981 for an order compelling the defendants to provide disclosure verified by an affidavit of a proper officer of all their assets worldwide. The court permitted service of the g claim form on the solicitors (Skadden) who had acted for the defendants in the arbitrations and related jurisdictional challenges. The claimant relied on *Maclaine Watson & Co Ltd v International Tin Council* (*No 2*) where the court found that it had jurisdiction under s 37(1) to make an injunction compelling disclosure of assets worldwide in aid of enforcing an arbitral award that had been converted into a judgment. The defendants in turn sought to rely on h *Masri* (*No 4*) in which the issue was whether the court had jurisdiction to make an order under CPR 71.2 directing an individual resident and domiciled in Greece who was the chairman, general manager and a director of a judgment debtor to attend court and provide information about the means of the judgment debtor against whom judgment had been given in English High Court proceedings. Relying on the presumption against extraterritoriality, the j court held that CPR 71 was to have been construed as not having extraterritorial effect. The defendants contended that the effect of *Masri* (*No 4*)

a Section 37(1) of the 1981 Act provides: 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

was that *Maclaine Watson* could no longer be relied on for the proposition that an order could have been made post judgment or award for disclosure of assets by a judgment or award debtor who was outside the jurisdiction. They contended that CPR 71 had provided a settled means for a judgment creditor to apply for an order to obtain information from an officer of a corporate judgment debtor to attend court to provide information about the judgment debtor's assets and that, if that means were unavailable because the officer of the debtor was outside the jurisdiction, the judgment creditor could not out-flank *Masri No 4* by applying for a disclosure order under s 37 of the 1981 Act. Secondly, the defendants contended that the service of the claim form and related documents on Skadden should have been set aside and for that reason alone the application had to be dismissed; it submitted that Skadden had not been authorised to accept service and the court ought not to have permitted an alternative method of service under CPR 6.15(1) since there had been no sufficiently exceptional circumstances to justify such an order. Further, they argued that the practice of serving on Skadden had not been applicable because the claim was not an arbitration claim as defined by CPR 62.2 and therefore the claim form should not have been treated as an arbitration claim form. That was because the arbitration proceedings effectively had been concluded and the claimant had relied only on s 37 of the 1981 Act, not s 44 of the 1996 Act, as the basis of its application for disclosure.

Held – (1) The defendants would be ordered to provide disclosure verified by an affidavit of a proper officer of their assets worldwide. *Masri* (*No 4*) did not prevent the court from granting the order under s 37(1) of the 1981 Act. In the instant case, the order requested was not an order addressed to a non-party outside the jurisdiction of the court, but was an order against the defendants who were subject to the court's jurisdiction. While the court had been asked to require the defendants to provide disclosure verified by an affidavit of a proper officer and all of the proper officers were very likely to have been outside the jurisdiction, that did not mean that the order would have been against or addressed to a party other than the defendants. The situation was therefore closely analogous to that where, in the course of the *Masri* litigation, the judge had made post-judgment orders under s 37 against the judgment debtors, inter alia, for a freezing order and disclosure of assets and it was not suggested in *Masri* (*No 4*), either in the Court of Appeal or the House of Lords, that such orders might have been invalid because CPR 71 did not have extraterritorial effect. In *Vitol SA v Capri Marine Ltd*, decided well after *Masri* (*No 4*), *Maclaine Watson* was cited with approval for the proposition that the court had a free-standing power derived from s 37 to order disclosure after judgment to render the judgment effective in the sense of capable of enforcement. Accordingly, the court had jurisdiction to make the order sought under s 37(1) of the 1981 Act and it fell to the court to consider whether it was just and convenient to do so. By virtue of the awards themselves, the claimant had had a contractual right to have been paid the sums awarded. The claimant had also been granted permission by the court to enforce the awards as judgments. It was the policy of the law that judgments of the court and arbitration awards should be enforced—that applied a fortiori where the award in question was made in an arbitration whose seat was within the jurisdiction. The claimant was not aware of the extent and nature of the defendants' assets. The order sought had the potential for materially assisting the claimant in enforcing the

a awards and it was just and convenient that the defendants would be ordered to provide disclosure verified by an affidavit of a proper officer of their assets worldwide (see [30], [31], below).

(2) The defendants' application to set aside the order permitting service on Skadden would be dismissed. It was open to the Commercial Court to continue to implement its invariable practice, relating to arbitrations seated b within the jurisdiction, to permit service upon a party's solicitor who had acted for that party in the arbitration, provided that that solicitor did not appear to have been disinstructed and absent other special circumstances. In the instant case, the seat of the arbitrations was London, Skadden had acted for all the defendants in those arbitrations and for all the defendants in the jurisdictional c challenges and at the relevant time did not appear to have been disinstructed. Further, the defendants having paid nothing to satisfy the awards, the quicker the applications for disclosure in aid of enforcement were brought before the court the better. The defendants' submission that the claim form should not have been treated as an arbitration claim form was not accepted; the claim being one whose purpose was to enforce two arbitral awards, it was an d 'application affecting arbitration proceedings', even though the application was made under s 37(1) of the 1981 Act and not under the 1996 Act; it was the policy of the law that judgments and arbitration awards should be enforced and CPR 62.2 was to be construed in the light of that policy (see [17], [23], [25], [26], below).

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Notes

For orders to obtain information from judgment debtors in general, see 12 *Halsbury's Laws* (5th edn) (2009) para 1251.

For service by an alternative method or at an alternative place, see 11 *Halsbury's Laws* (5th edn) (2009) para 152.

f

Cases referred to in judgment

Abela v Baadarani [2011] EWCA Civ 1571, [2011] All ER (D) 171 (Dec).

Ashtiani v Kashi [1986] 2 All ER 970, [1987] QB 888, [1986] 3 WLR 647, CA.

Bekhor (AJ) & Co Ltd v Bilton [1981] 2 All ER 565, [1981] QB 923, [1981] 2 WLR 601, CA.

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Cecil v Bayat [2011] EWCA Civ 135, [2011] 1 WLR 3086.

Department of Civil Aviation under the Ministry of Transport and Communication of the Kyrgyz Republic v Finrep GmbH [2006] EWHC 1722 (Comm), [2007] Bus LR D17.

Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda, The Naftilos h [1994] 4 All ER 507, [1995] 1 WLR 299.

Interpool Ltd v Galani [1987] 2 All ER 981, [1988] QB 738, [1987] 3 WLR 1042, CA.

Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649.

j *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, [2001] 2 All ER (Comm) 960, [2002] 1 WLR 907.

Lewisham London BC v Malcolm [2008] UKHL 43, [2008] 4 All ER 525, [2008] 1 AC 1399, [2008] 3 WLR 194.

MacLaine Watson & Co Ltd v Dept of Trade and Industry, Re International Tin Council, MacLaine Watson & Co Ltd v International Tin Council, MacLaine

Watson & Co Ltd v International Tin Council (No 2) [1988] 3 All ER 257, [1989] 1 Ch 286, [1988] 3 WLR 1190, CA.
Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd [1985] 3 All ER 747, [1984] 1 WLR 1097.
Rich (Marc) & Co AG v Società Italiana Impianti PA, The Atlantic Emperor Case C-190/89 [1992] 1 Lloyd's Rep 342, ECJ.
Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny [1980] 1 All ER 718, [1980] 1 WLR 460.
Vitol SA v Capri Marine Ltd [2010] EWHC 458 (Comm), [2011] 1 All ER (Comm) 366.

Application
Cruz City 1 Mauritius Holdings, the claimant, applied for an order compelling Unitech Ltd, Burley Holdings Ltd and Arsanovia Ltd, the defendants, to provide disclosure of all their assets worldwide, in aid of enforcing a partial award made against the first and second defendants and a final award against the third defendant. Both awards were made against the defendants in arbitration proceedings and, in January 2013, Cooke J permitted the claimant to enforce them in the same manner as judgments or orders of the court. The facts are set out in the judgment below.

David Wolfson QC and *Nehali Shah* (instructed by *White & Case LLP*) for the claimant.
Jonathan Hirst QC and *Craig Morrison* (instructed by *Skadden, Arps, Slate, & Flom (UK) LLP*) for the defendants.

Judgment was reserved.

23 May 2013. The following judgment was delivered.

FIELD J.

INTRODUCTION

[**1**] This is an application under s 37(1)[1] of the Senior Courts Act 1981 for an order compelling the defendants to provide disclosure verified by an affidavit of a proper officer of all their assets worldwide. In the case of the first and second defendants, the proposed order is limited to assets exceeding $US1m in value.

[**2**] The order is sought in aid of execution to enforce a partial award and a final award made in LCIA Arbitration proceedings, namely: Partial Award No 2 (against the first and second defendants) and Final Award No 3 (against the third defendant). A third award, Partial Award No 1 (made against the second and third defendants) was the subject of a successful jurisdictional challenge before Andrew Smith J and is not sought to be enforced. A jurisdictional challenge to Partial Award No 2 failed.

[**3**] The arbitrations concerned a joint venture arrangement (the 'Santacruz Project') between the claimant and the defendants for the commercial development, management and operation of certain land in Mumbai. In order to facilitate the parties' investments in the Santacruz Project, an SPV, Kerrush Investments Ltd ('Kerrush'), was incorporated which at the outset of the Santacruz Project was owned 50% by the claimant and 50% by the third

1 Section 37(1): 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.'

defendant. The disputes arose out of a shareholders' agreement entered into between, inter alios, the claimant, the third defendant and Kerrush on 6 June 2008 (the 'shareholders' agreement') and a Keepwell agreement between the claimant, and the first and second defendants, under which the first defendant agreed to maintain the solvency of the second defendant.

[**4**] In Partial Award No 2 ('Award 2') the Tribunal ordered, inter alia, that the first and second defendants must pay to the claimant US$298,382,949.34 for all of the claimant's shares in Kerrush with interest at 8% pa, compounded quarterly, from the date of the award until payment. In Final Award No 3 ('Award 3') the third defendant was ordered, inter alia, to pay the claimant $US2,900,000 in respect of its legal fees and other costs and expenses with interest at 8% pa compounded quarterly from the date of the award until payment.

[**5**] The defendants have paid nothing towards satisfying Awards 2 and 3.

[**6**] At the end of January 2013 Cooke J made orders under s 66(1) of the Arbitration Act 1996 permitting the claimant to enforce Awards 2 and 3 in the same manner as judgments or orders of the court. Cooke J also permitted service of the underlying enforcement applications to be made on Skadden, Arps, Slate, Meagher & Flom ('Skadden'), the solicitors who had acted for all the defendants in the arbitrations and for all the defendants in the jurisdictional challenges to Awards 1 and 2.

[**7**] The arbitration claim form was issued on 5 February 2013. It was stamped 'not for service out of the jurisdiction' and, by order dated 8 February 2013, Cooke J permitted service on Skadden of the claim form and the affidavit in support of the application for the disclosure of assets. On the same date, the claim form and the affidavit were served by hand on Skadden but the acknowledgement of service form was mistakenly excluded from the documents served at this time.

[**8**] On 19 March 2013 copies of the claimant's further evidence and skeleton argument in respect of the instant application were served at the offices of Skadden pursuant to an order of Andrew Smith J of even date permitting service of these documents in this manner.

[**9**] In support of the application for disclosure of assets worldwide, Mr Wolfson QC placed substantial reliance on *MacLaine Watson & Co Ltd v Dept of Trade and Industry, Re International Tin Council, MacLaine Watson & Co Ltd v International Tin Council, MacLaine Watson & Co Ltd v International Tin Council* (*No 2*) [1988] 3 All ER 257, [1989] 1 Ch 286 and *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda, The Naftilos* [1994] 4 All ER 507, [1995] 1 WLR 299. In *Maclaine Watson* the claimant sought an injunction against the ITC compelling disclosure of its assets worldwide in aid of enforcing an arbitral award that had been converted into a judgment for £6m odd. At first instance, Millett J held that RSC Ord 48 (that gave the court power to order an officer of a corporate judgment debtor to be orally examined on the debtor's assets) could not be invoked against the ITC because it was an unincorporated association. However, he found that the court had jurisdiction under s 37(1) of the Supreme Court Act 1981 to make the order sought and granted an injunction compelling disclosure of the ITC's assets worldwide. In upholding Millett J's decision, the Court of Appeal (per Kerr LJ who delivered the judgment of the court) expressly approved the following two passages in Millett J's judgment ([1987] 3 All ER 886 at 890–892, [1987] 1 WLR 1711 at 1716–1717):

'It is now clearly established that the court has jurisdiction under s 37(1) to grant a *Mareva* injunction before trial in order to restrain a defendant from removing from the jurisdiction so much of its assets as may be needed to meet the plaintiff's pending claim. The object is to prevent a defendant from frustrating the judgment of the court by removing assets from the jurisdiction or concealing them within it and so rendering execution ineffective. In *AJ Bekhor (AJ) & Co Ltd v Bilton* [1981] 2 All ER 565, [1981] QB 923 the Court of Appeal held that the court had power under s 37(1) to make all such ancillary orders, including an order for discovery, as appeared to the court to be just and convenient in order to ensure that the exercise of the *Mareva* injunction was effective to achieve its purpose.

A *Mareva* injunction can also be granted after final judgment in aid of execution to preserve a judgment debtor's assets until execution can be levied on them: see *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747, [1984] 1 WLR 1097 and *Stewart Chartering Ltd v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718, [1980] 1 WLR 460. In such a case there is normally no need to support the *Mareva* injunction with an order for discovery, since resort can be had to Ord 48.

In this case the applicants rightly do not seek a *Mareva* injunction. There is no reason to believe that the ITC will remove its assets from the jurisdiction in order to defeat execution. The applicants seek only an order for discovery in aid of execution, the procedure of Ord48 being unavailable. The ITC contend that there is no jurisdiction to make such an order in the absence of a *Mareva* injunction. It is, however, fallacious to reason from the fact that an order for discovery can be made as ancillary to a *Mareva* injunction to the conclusion that it cannot be made except as ancillary to such an injunction. The source of the jurisdiction is the same, and so is the ground for exercising it, viz. that it appears to the court to be just and convenient to do so …

In the present case the order sought may properly be said to be sought in aid of or for the purpose of implementing the judgment previously obtained by the applicants. It is, within proper limits, the policy of these courts to prevent a defendant from removing its assets from the jurisdiction or concealing them within it, so as to deny a successful plaintiff the fruits of his judgment. This is the policy which underlies the *Mareva* jurisdiction, before and after judgment, pre-trial discovery of assets in aid of the *Mareva* jurisdiction and Ord 48. That policy can only be given effect if a defendant can be ordered when necessary to provide information about the nature and whereabouts of its assets. It can only be given effect in the present case if the court has power to make the order sought. Although Ord 48 is not available, the underlying policy of that Order would be forwarded, not frustrated, by the order. There is no doubt that it is just and convenient to make it. No ground has been put forward why I should exercise my discretion against making the order, and I can see none.'

[**10**] Kerr LJ said ([1988] 3 All ER 257 at 379–380, [1989] 1 Ch 286 at 303):

'Maclaine Watson have an order of the court against the ITC to pay to Maclaine Watson the amount of their judgment. The ITC's failure to do so is a failure to comply with an order of the court and a breach of an obligation owed to Maclaine Watson. As Ralph Gibson LJ pointed out in

a the course of the argument, it matters little whether one speaks of an invasion of a plaintiff's right or of a breach of an obligation owed to a plaintiff. The court's statutory power to grant an injunction if it appears just and convenient to do so, in this case in mandatory form, is not excluded by any authority. Second, there is the authority of this court in *AJ Bekhor & Co Ltd v Bilton* [1981] 2 All ER 565, [1981] QB 923 and other cases b that there is an inherent power under what is now s 37(1) to make any ancillary order, including an order for discovery, to ensure the effectiveness of any other order made by the court. This applies in the unusual circumstances of the present case. Since the alternative means of appointing a receiver or of making an order under Ord 48 are unavailable, the order for disclosure is necessary to render Maclaine Watson's judgment c against the ITC effective.'

[**11**] Citing *Interpool Ltd v Galani* [1987] 2 All ER 981, [1988] QB 738, the Court of Appeal also confirmed that the court had jurisdiction to order disclosure of assets outside the jurisdiction as well as inside the jurisdiction ([1988] 3 All ER d 257 at 382, [1989] 1 Ch 286 at 306).

[**12**] In *The Naftilos*, the claimants had obtained two arbitration awards made in London awarding substantial sums by way of unpaid charter hire and had been given leave to enforce the first award as a judgment under s 26 of the Arbitration Act 1950. The claimants also had a third arbitration on foot e claiming damages for wrongful repudiation of the time charter. On application by the claimants made ex parte, Colman granted a *Mareva* injunction restraining the removal of assets in the jurisdiction or otherwise dealing with such assets. The defendant was also ordered, inter alia, to identify all of its vessels and related charterparties and details of all bank accounts where freight and other remuneration from its vessels were received whether the vessels and f bank accounts were within or without the jurisdiction. On application by the defendant under the liberty to apply, the question arose whether the disclosure obligation should be limited to assets within the jurisdiction, on which question the judge heard further argument at an adjourned hearing by when judgment had been entered on the first award and counsel for the claimant had become aware of the decision of the Court of Appeal in *Maclaine Watson*. g Colman J held that the court had jurisdiction under s 37 of the 1981 Act to make disclosure orders ancillary to a *Mareva* injunction granted in relation to an arbitration claim or award just as it did in relation to court proceedings and, having considered the judgment of the Court of Appeal in *Maclaine Watson*, went on to say ([1994] 4 All ER 507 at 518–520, [1995] 1 WLR 299 at 309–310):

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'The Court of Appeal thus approved the granting of a mandatory injunction for the purpose of assisting the enforcement of another order of the court, namely, the judgment into which the arbitration award had already been converted. Although, therefore, there was no prior Mareva injunction in relation to which an order for disclosure of assets could be j made as an ancillary power to the granting of the Mareva, as in *Bekhor v Bilton*, there was an earlier judgment against ITC which appeared to have assets overseas and in support of which the disclosure order could be made as a free-standing mandatory injunction. The Court of Appeal had already held in *Interpool Ltd v Galani* [1987] 2 All ER 981, [1988] QB 738 that Ord 48 could extend to assets outside the jurisdiction. That being so, and since the

enforcement of the judgment was not confined to assets within the jurisdiction, there was no reason why the disclosure order should be so confined.

Accordingly, where an English arbitration award has been converted into an English judgment, there is jurisdiction to order in an appropriate case that the judgment debtor/arbitration respondent should disclose assets and, if it appears likely that there are assets abroad, that he should disclose his assets outside, as well as inside, the jurisdiction. Moreover, such an order can be made in aid of execution, even if there is no Mareva injunction in aid of execution. If the award has not yet been turned into a judgment—and in this case that is the position in relation to the second award—there is, in my judgment, no reason in principle why there should not also be jurisdiction under s 37(1) of the 1981 Act, coupled with s 12(6)(f) and (h)[2] of the Arbitration Act 1950, to grant a disclosure order and to extend it in an appropriate case to assets outside the jurisdiction of the English courts. The effect of s 12(6) is to enable the court to make in relation to a reference those orders which it could have made if the reference had been a High Court action. There is no reason, as a matter of construction of s 12(6), why the analogy of the High Court action should stop upon the making of the arbitration award. Just as there can, in an appropriate case, be a Mareva injunction in aid of execution of the award, supported by a disclosure order, before it has been turned into a judgment, there is no reason why there should not also, in an appropriate case, be a free-standing disclosure order in respect of the losing respondent's assets. The absence of a judgment, as distinct from an award, should make no difference for it is the policy of the law that arbitration awards should be satisfied and executed. Hence the power to convert them into judgments under s 26 of the 1950 Act and Ord 73, r 10. If the award had been a judgment of the court, a free-standing mandatory injunction for disclosure of assets could have been made in support of that order. Accordingly, by reason of the statutory analogy provided by s 12(6)(f) and (h) of the 1950 Act, there must equally be jurisdiction to grant such an order in support of the enforcement of an arbitration award notwithstanding that it has *not* yet been converted into a judgment …

… in *Derby v Weldon* (*No 2*) [1989] 1 All ER 1002 at 1021, [1990] Ch 65 at 94–95 Neill LJ reaffirmed, albeit obiter, his conviction expressed in *Ashtiani v Kashi* [1986] 2 All ER 970, [1987] QB 888 that disclosure orders should be co-extensive with the scope of the Mareva injunction to which they were ancillary. It is to be observed, however, that both in *Ashtiani v Kashi* and in *Derby v Weldon* (*No 2*) the courts were concerned with pre-judgment orders which included Mareva injunctions. The orders for disclosure were, therefore, orders ancillary to those injunctions. There was no question of there being any other order in support of which a disclosure order could be justified. Where, by contrast, one has the position that a judgment has been already obtained or an award made and where a Mareva injunction in aid of execution is justified, the jurisdiction to make a disclosure order arises both as a power ancillary to and in support of the injunction and

2 'The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of–(f) securing the amount in dispute in the reference … (h) interim injunctions or the appointment of a receiver, as it has for the purpose of and in relation to an action or matter in the High Court.'

a independently of the injunction as a power in support of the execution of the judgment or award. It follows that, whereas it may on the facts of the case in question be inappropriate to extend the Mareva injunction to assets outside the jurisdiction—and it is clear from the two authorities cited that such extensions are likely to be rarely justified—very different considerations may apply to disclosure orders in aid of execution. That b being so, there is, in my judgment, a very firm jurisdictional basis for an order, made post-judgment or post-award, which includes both a Mareva injunction confined to assets within the jurisdiction and a disclosure order in respect of worldwide assets.'

[13] The defendants oppose the claimant's application on two separate c grounds. First, it is submitted that the service of the claim form and the further documents relating to this application on Skadden should be set aside and for that reason alone the application must be dismissed. Skadden were not authorised to accept service and Cooke J ought not to have permitted an alternative method of service under CPR 6.15(1) since there were here no sufficiently exceptional circumstances to justify such an order. Second, it is d argued that, to the extent *Maclaine Watson* decided that a foreign defendant can be ordered by injunction to make disclosure of assets outside the jurisdiction in aid of execution of a judgment, it is no longer good law by reason of the decision in the House of Lords in *Lewisham London BC v Malcolm* [2008] UKHL 43, [2008] 4 All ER 525, [2008] 1 AC 1399.

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THE SERVICE ISSUE

[14] The acknowledgement of service was served on 20 March 2013 with a tick in the boxes 'I intend to contest this claim' and 'I intend to dispute the court's jurisdiction'. This was 22 days after the date it ought to have been f served (26 February 2013). On the following day (21 March 2013) the defendants applied to set aside the orders of Cooke and Andrew Smith JJ permitting service on Skadden. Mr Wolfson submitted that the defendants by their application were disputing the court's jurisdiction and having failed to serve the acknowledgement of service form within the time prescribed by CPR 10 they were precluded from making the application. I do not accept this g submission. In my opinion, the defendants are not disputing at this stage the court's jurisdiction. However, in case I am wrong about that, I extend time to serve the acknowledgement of service to the date it was in fact served.

[15] In *Cecil v Bayat* [2011] EWCA Civ 135, [2011] 1 WLR 3086, the Court of Appeal (per Stanley Burnton LJ, with whom Rix and Wilson LJJ agreed) stated (obiter) as follows:

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'[65] … Because service out of the jurisdiction without the consent of the State in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR 6.15 should be regarded as exceptional, to be permitted in special circumstances only.

j [66] It follows, in my judgment, that while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration when deciding whether to make an order under CPR r 6.15, it is in general not a sufficient reason for an order for service by an alternative method.

> [68] Service by alternative means may be justified by facts specific to the defendant, as where there are grounds for believing that he has or will seek to avoid personal service where that is the only method permitted by the foreign law, or by facts relating to the proceedings, as where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after the issue of proceedings …'

[**16**] These observations were accepted and applied by the Court of Appeal in the later case of *Abela v Baadarani* [2011] EWCA Civ 1571, [2011] All ER (D) 171 (Dec).

[**17**] In neither *Cecil v Bayat* nor *Abela* was there any reference to the invariable practice in the Commercial Court in relation to arbitration applications relating to arbitrations seated within the jurisdiction to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed and absent other special circumstances. This practice was referred to by Tomlinson J in *Department of Civil Aviation under the Ministry of Transport and Communication of the Kyrgyz Republic v Finrep GmbH* [2006] EWHC 1722 (Comm), [2007] Bus LR D17. In that case, it was argued on the basis of *Knauf UK GmbH v British Gypsum Ltd* [2001] EWCA Civ 1570, [2001] 2 All ER (Comm) 960, [2002] 1 WLR 907 that, even in relation to an arbitration claim, a mere desire for speed was unlikely to amount to a good reason to authorise service by an alternative method and that the defendant was entitled to be served pursuant to the provisions of the European Union Service Regulation no 1348 of 2000. Paragraphs [29] and [36]–[39] of Tomlinson J's judgment read as follows:

> '[29] I also indicated at the outset of the hearing that in relation to arbitration applications concerning arbitrations which have their seat within the jurisdiction it is the almost invariable practice of the court to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed or absent other special circumstances. This practice is reflected in para 3.1 of Arbitration Practice Direction 62.4 which provides, under the rubric "Arbitration Claim Form Service":
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> "3.1 Service. The court may exercise its powers under Rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration." …
>
> [36] … *Knauf* was concerned with straightforward originating process in circumstances where the claimant German company wished to bring proceedings in England against the first defendant, an English company, and the second defendant, Peters, a German company, in circumstances where the claimant feared that once Peters knew that it might be served with English proceedings it would itself begin proceedings in Germany which would then have priority by virtue of art 21 of the Brussels Convention. The claimant would then have to litigate in England against the first defendant, British Gypsum, and in Germany against the second defendant, Peters. That is a very different context than is provided by the issue of an Arbitration Claim Form relating to an arbitration which has its seat in England. In such circumstances the parties to the arbitration have already submitted themselves to the supervisory jurisdiction of the English court. An application for permission to serve by an alternative method is

a therefore most certainly not subversive of any principles upon which jurisdiction is regulated by agreement between the United Kingdom and its Convention or Community partners, a conclusion which is reinforced by the fact that proceedings relating to arbitration are in any event excluded from the ambit of the Convention, now the Regulation (see *The Atlantic Emperor* [1992] 1 Lloyd's Rep 342).

b [37] Furthermore I do not consider that in this context an order for service upon a party's representative acting for him in the English arbitration can properly be regarded as subversive of the Service Regulation. That Regulation provides the method by which service must be effected in a state other than that in which the process originates, if c service in that second state is necessary. In the present context the Court must first be satisfied that the circumstances are such that it is appropriate to permit service of the overseas party out of the jurisdiction. CPR 62(5) deals with this situation. Whilst CPR 62(5) does not contain the same provisions as are contained within CPR 6(21) nonetheless this is a discretionary jurisdiction. Although an application under s.67 or indeed d s.68 of the Arbitration Act 1996 is made as of right there might be circumstances in which, for example, the application appeared to the court to be so frivolous in nature as not to justify the court permitting service thereof out of the jurisdiction. Assuming however that that threshold is crossed, there is in my judgment nothing subversive of the Service Regulation in the court thereafter making an order for service by a method e other than personal service outside the jurisdiction if satisfied that in all the circumstances personal service in that manner is not necessary or appropriate. Such a conclusion renders the provisions of the Service Regulation of no further relevance.

[38] The discretion given to the court by CPR 6.8(1) is dependent upon f there appearing to be good reason to authorise service by an alternative method. In the context of an arbitration which has its seat in England or Wales and where the party thereto sought to be served with an arbitration application relating to that arbitration has an agent within the jurisdiction who acts or acted for him in the arbitration and whose authority does not appear to have been determined there will in my judgment very often, and g perhaps ordinarily, be good reason to permit service to be made upon that agent rather than requiring service to be effected out of the jurisdiction. In such circumstances an application to serve upon the agent is not motivated by a mere desire for speed in effecting service. It is inherently desirable and in the interests of all parties that if arbitration applications are made in relation to either pending or otherwise completed arbitrations they are h determined by the court as soon as reasonably practicable, consistent with their being dealt with justly. Such disposal contributes to the achievement of finality of the arbitral process. Moreover, in the ordinary case where an overseas party to an English arbitration has or has had solicitors in England acting for him in that arbitration, service of the application and associated documents upon the English solicitors is the most reliable method j whereby those documents will be brought expeditiously to the attention of the responsible persons within the relevant entity sought to be served. It will also usually be the most economical method of achieving that result.

[39] I do not regard anything said by the Court of Appeal in the *Knauf* case as either preventing or indeed discouraging this Court from continuing to adopt this approach which underlies the practice of the court

to which I have referred earlier. I should add that in a proper case there will often in my judgment be a good reason to permit service in such circumstances to be made on overseas lawyers rather than upon their clients, as where, for example, as often occurs, a party to a London arbitration is represented in that arbitration by a firm of New York attorneys. Everything must depend upon the circumstances.'

[**18**] Although not referred to in *Cecil v Bayat* or *Abdela*, neither of which involved an arbitration claim, Tomlinson J's reference to the practice in the Commercial Court in arbitration claims relating to arbitrations seated within the jurisdiction was noted without disapproval by the Court of Appeal in the later case of *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644, [2012] 1 Lloyd's Rep 649. One of the issues there was whether the court had jurisdiction under the necessary and proper party 'gateway' in respect of an anti-suit injunction to restrain foreign proceedings taken in breach of an arbitration agreement. When obtaining leave to serve the claim form on a Russian party, the claimant had represented that it would serve the claim form on the first defendant by serving it in London. In dealing with the argument that until permission is obtained, it cannot be said that a defendant will be served in the jurisdiction, Stanley Burnton LJ held that, whilst this must be right where there is a real question as to whether permission to serve out will be granted, the instant case was not such a case. The learned Lord Justice cited para [29] of Tomlinson J's judgment in *Kyrgyz* and went on to say:

'[75] I have no doubt that, if he had been asked, Hamblen J would have granted permission to serve D1 by service at its solicitors' address. The evidence is that it may take 2 years to effect service in Russia under the Hague Convention. As I understand it, service on D2 under the Hague Convention has still not taken place. The relief sought by the Bank required a speedy *inter partes* hearing that could not be achieved if service had to be effected under the Hague Convention. There was therefore good reason, as explained in *Cecil v Bayat* [2011] EWCA Civ 135 [2011] 1 WLR 3086 at para 68, to order service by alternative means …'

[**19**] It follows, in my judgment, that it is open to the Commercial Court to continue to implement its invariable practice in respect of arbitration applications concerning arbitrations which have their seat within the jurisdiction if it be the position, as it will be in the vast majority of cases, that there is good reason for service to be achieved faster than it would be under the relevant service convention.

[**20**] Mr Hirst QC for the defendants submitted that the invariable practice was not applicable to the claim herein because it was not an arbitration claim as defined by CPR Pt 62.2, and therefore the claim form should not be treated as an arbitration claim form.

[**21**] An 'arbitration claim' is defined as follows in CPR Pt 62.2 as follows:

'Interpretation
(1) In this Section of this Part "arbitration claim" means—
(a) any application to the court under the 1996 Act;
(b) a claim to determine—
(i) whether there is a valid arbitration agreement;
(ii) whether an arbitration tribunal is properly constituted; or

what matters have been submitted to arbitration in accordance with an arbitration agreement;

(c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and

(d) any other application affecting—

(i) arbitration proceedings (whether started or not); or

(ii) an arbitration agreement.'

[**22**] Mr Hirst submitted that even though Award 2 was a partial award in which the tribunal had directed it would determine any dispute that might arise from the imposition of future taxes or other implementation matters, the arbitration proceedings were effectively concluded and it followed that the claim did not fall within the definition. No implementation disputes had been referred to the tribunal. Mr Hirst also pointed to the fact that although s 44 of the 1996 Act is prayed in aid in the claim form, the claimant now relies only on s 37 of the 1981 Act as the basis of its application for disclosure of assets.

[**23**] I decline to accept Mr Hirst's submission. In my judgment, the claim being one whose purpose is to enforce two arbitral awards, it is an 'application affecting arbitration proceedings', even though the application is made under s 37(1) of the 1981 Act and not under the 1996 Act. As Colman J remarked in *Gidrxslme Shipping Co Ltd v Tantomar-Transportes Maritimos Lda* [1994] 4 All ER 507 at 519, [1995] 1 WLR 299 at 310 it is the policy of the law that judgments and arbitration awards should be enforced and I am of the firm opinion that CPR Pt 62.2 should be construed in the light of this policy.

[**24**] Mr Hirst also submitted that the claimant ought to have applied for permission to serve the claim form out of the jurisdiction whereas what had been applied for was simply permission to serve the claim form and other documents on Skadden as a form of alternative service. This raises an extremely technical point. On balance, I think that, if what is sought is an order for alternative service within the jurisdiction, it is unnecessary to apply for permission to serve out provided the court is informed that the proposed defendants are outside the jurisdiction. So technical is the nature of Mr Hirst's submission I would have had no hesitation in treating the claimant's application to Cooke J as an application for permission to serve out if I had been persuaded that the submission was correct

[**25**] In my judgment, the invariable practice of this court in respect of applications concerning arbitrations seated in the jurisdiction applies in this case. The seat of the LCIA arbitrations was and continues to be London. Skadden acted for all the defendants in those arbitrations and for all the defendants in the jurisdictional challenges and at the relevant time they did not appear to have been disinstructed. Further, the defendants having paid nothing to satisfy Awards 2 and 3 since they were made on 6 July 2012, the quicker these applications for disclosure in aid of enforcement are brought before the court the better.

[**26**] The defendants' application to set aside the orders of Cooke and Andrew Smith JJ permitting service on Skadden is accordingly dismissed.

THE IMPACT (IF ANY) OF *MASRI* (NO 4) ON *MACLAINE WATSON*

[**27**] In *Masri* (*No 4*), the issue was whether the court had jurisdiction to make an order under CPR Pt 71.2[3] directing a named individual resident and domiciled in Greece who was the chairman, general manager and a director of a judgment debtor to attend court and provide information about the means of the judgment debtor against whom judgment had been given in English High Court proceedings. CPR Pt 71 is the successor to RSC Ord 48.

[**28**] Relying on the presumption against extraterritoriality, Lord Mance (with whom the rest of the Committee agreed) held that CPR Pt 71 should be construed as not having extraterritorial effect. It did not contemplate an application and order in relation to an officer outside the jurisdiction (para 26). This conclusion was reinforced by a consideration of the position relating to service. The CPR contained no provision authorising service of an order made against an officer under CPR Pt 71 (paras 27–38).

[**29**] Mr Hirst contended that the effect of *Masri* (*No 4*) was that *Maclaine Watson* could no longer be relied on for the proposition that an order could be made post judgment or award for disclosure of assets by a judgment or award debtor who was outside the jurisdiction. He contended that by Pt 71, the CPR provided a settled means for a judgment creditor to apply for an order to obtain information from an officer of a corporate judgment debtor to attend court to provide information about the judgment debtor's assets and if that means is unavailable because the officer of the debtor is outside the jurisdiction, the judgment creditor cannot out-flank *Masri* (*No 4*) by applying for a disclosure order under s 37 of the 1981 Act. In support of this submission, Mr Hirst observed that: (i) in the five years since *Masri* (*No 4*), CPR Pt 71 has not been amended so as to allow for orders to be made against officers outside the jurisdiction and nor has CPR Pt 6 been amended to allow for orders made under CPR Pt 71 to be served out of the jurisdiction; (ii) in *Maclaine Watson* the Court of Appeal proceeded on the basis that RSC Ord 48 did not apply to unincorporated associations, whereas CPR Pt 71 does apply to foreign corporations and officers thereof within the jurisdiction can be ordered to attend court to be examined; and (iii) the ITC was a London based organisation and thus presumably had officers within the jurisdiction.

[**30**] In my judgment, *Masri* (*No 4*) does not prevent the court from granting the order sought in this case under s 37(1) of the 1981 Act. Here the order requested is not an order addressed to a non-party outside the jurisdiction of the court but is an order against the defendants who are subject to the court's jurisdiction. It is true that the court is asked to require the defendants 'to provide disclosure … verified by an affidavit of a proper officer' and all of the proper officers are very likely to be outside the jurisdiction, but this does not mean that the order will be against or addressed to a party other than the defendants. The situation is therefore closely analogous to that where, in the course of the *Masri* litigation, Gloster J made post-judgment orders under s 37 of the 1981 Act against the judgment debtors, inter alia, for a freezing order and disclosure of assets—and it was not suggested in *Masri* (*No 4*) either in the Court of Appeal or the House of Lords that such orders might be invalid because CPR Pt 71 did not have extraterritorial effect. It is also to be noted that in *Vitol SA v Capri Marine Ltd* [2010] EWHC 458 (Comm), [2011] 1 All ER

3 71.2(1) A judgment creditor may apply for an order requiring—(a) a judgment debtor; or (b) if a judgment debtor is a company or other corporation, an officer of that body, to attend court to provide information about—(i) the judgment debtor's means; or (ii) any other matter about which information is needed to enforce a judgment or order.

a (Comm) 366, decided well after *Masri* (*No 4*), Tomlinson J cited with approval *Maclaine Watson* and *The Naftilos* for the proposition that the court has a free-standing power derived from s 37 of the 1981 Act to order disclosure after judgment to render the judgment effective in the sense of capable of enforcement.

I accordingly hold that the court has jurisdiction to make the order sought b under s 37(1) of the 1981 Act and I now consider whether it is just and convenient to do so. By virtue of the awards themselves, the claimant has a contractual right to be paid the sums awarded. The claimant has also been granted permission by the court to enforce the awards as judgments. As I have already observed, it is the policy of the law that judgments of the court and arbitration awards should be enforced, and this applies a fortiori where the c award in question, as here, was made in an arbitration whose seat was within the jurisdiction. The second and third defendants are both SPVs and the claimant is not aware of the extent and nature of the defendants' real estate assets, or other assets, in India or the manner in which such assets are held, or what assets the defendants may hold outside India (other than shareholdings d identified in publicly available documents, although the corporate structure of the group is not clear). In my view, the order sought has the potential for materially assisting the claimant in enforcing Awards 2 and 3 and I readily find that it is just and convenient that the defendants should be ordered to provide disclosure verified by an affidavit of a proper officer of their assets worldwide.

e *Application allowed.*

Toby Frost Barrister.